

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 95B015

CCRD Charge No. S95GY001

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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CAROL A. DAVEY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,  
COLORADO STATE UNIVERSITY,

Respondent.

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This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on April 6, 1995. Respondent was represented by William E. Thro, Assistant Attorney General. Complainant appeared pro se.

Complainant testified in her own behalf and called William B. Liley, Jr., Director of Human Resource Services, Colorado State University. Complainant's Exhibits A through F were stipulated into evidence.

**MATTER APPEALED**

Complainant alleges that she was denied bumping rights, that she was not notified of pertinent job openings while she was on the reemployment list, that her name was improperly removed from the reemployment list and that she was not notified of open positions

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during such time.

### **ISSUES**

1. Whether Complainant's appeal is timely;
2. Whether the State Personnel Board has subject matter jurisdiction.

### **PRELIMINARY MATTERS**

On February 1, 1995, Respondent filed a motion to dismiss Complainant's appeal for lack of subject matter jurisdiction on grounds that the appeal was untimely. Complainant filed a response on February 21. Pursuant to an Order entered by Administrative Law Judge Margot Jones on March 7, 1995, the sole issue for determination at this hearing was whether the Board has jurisdiction over the appeal.

### **FINDINGS OF FACT**

1. Complainant, Carol Davey, was employed as Senior Secretary (now classified Administrative Assistant III) with Colorado State University (CSU). Her position was abolished in September of 1991. The University created a temporary position for her in the Provost's office, which lasted for two months. She then took a six-month leave of absence without pay. The effective date of her layoff was June 1, 1992. She was placed on the reemployment list for two years, ending on May 31, 1994.
2. State Personnel Board Rule R9-3-10, 4 Code Colo. Reg. 801-1, provides that, effective April 1, 1992, a certified employee who

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is laid off is entitled to be placed on the departmental reemployment list for one year. This applies to all layoffs for which the first notice of layoff was issued on or after that date.

Previously, the employee was entitled to be placed on the departmental reemployment list for two years. In Complainant's case, the agency granted an optional one-year extension of the one-year reemployment list period pursuant to Procedure P5-5-3(B) in effect at the time of her layoff. (Exhibit F.)

3. On July 7, 1994, Complainant filed a notice of appeal with the State Personnel Board appealing the removal of her name from the reemployment list. On July 19, 1994, an administrative law judge found that Complainant had received notice of the removal of her name via a May 31, 1994 letter from William Liley, Director of Human Resource Services for CSU, and that Complainant's appeal was therefore untimely. Complainant's appeal was dismissed with prejudice for lack of subject matter jurisdiction on July 19. (Case No. 95B005.)

4. The May 31 letter from Liley, which was written in response to an inquiry from Complainant, concludes with the following paragraph: "I have asked my staff who have worked directly with your referrals while on the reemployment list to provide me information concerning the specific positions you mentioned in your letter. I will address those in a follow up letter as soon as I have the information requested." (Exhibit C.)

5. Liley's further response, promised in the May 31 letter, came in the form of a July 5, 1994 letter, which Complainant received on July 16, 1994. Because this letter served as the basis for the present appeal, it is quoted in full as follows:

As a follow up to may (sic) earlier letter to you, our records concerning your not being placed in the

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position(s) at the University you referenced in your April 29, 1994 letter reflect:

- (1) Your name was removed from the reemployment list on September 2, 1992 and was reinstated on February 18, 1993. Any positions vacated during that period would not have been offered to you since you had no reemployment status during that period.
- (2) The positions in the Engineering College and Animal Science Department were filled via lateral transfer within the University. The positions vacated by these transfers were never filled.
- (3) The position in the Student Health Center was determined to require special qualifications, including significant experience in medical insurance claim processing, which you did not possess. Thus, that position was judged to be exempt from the reemployment process. To our knowledge, this is the only position designated as having special qualifications during your time on the reemployment list. For your information, special qualifications exceed those referred to in your letter as the "training" needs every time a person goes into a new job.
- (4) Our records indicate that the period of September 2, 1991 through February 18, 1993 was the only period that you were removed from the reemployment list.<sup>1</sup> The circumstances referred to in your letter for the period of August to November 1993 did not affect your status on the reemployment list during that period.

(Exhibit A.)

6. Following the receipt of Liley's July 5 letter on July 16, Complainant filed this appeal on July 21, 1994, alleging that she was denied bumping rights, that she was not notified of "many" Administrative Assistant III openings while on the reemployment list, and that CSU had removed her name from the reemployment list

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<sup>1</sup> Although Complainant does not concede the fact, Liley testified, and it is found, that the year "1991" was a typographical error and that the correct year is 1992.

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without notice. Complainant alleged discrimination based on age and disability.

7. This appeal is substantially the same as the appeal in Case No. 95B005, the primary difference being the alleged date of notice, i.e., July 16, 1994.

8. On July 29, 1994, the matter was referred to the Colorado Civil Rights Division (CCRD) for investigation of the claims of discrimination. The CCRD recommended that the case be administratively closed on grounds that the allegations raised by Complainant in her appeal were different from the allegations she raised before the CCRD. Complainant was notified in writing of the CCRD recommendation but did not file a timely appeal thereof.

By order entered January 17, 1995, an administrative law judge ruled that Complainant had waived the issue of discrimination and that the issue of discrimination would not be litigated at hearing.

9. Complainant concedes that the time for appealing the alleged denial of bumping rights has long since passed and that such an appeal is now untimely.

10. Complainant interviewed for a position with the Engineering Department in June or July of 1993. She interviewed for positions with the Animal Science Department and the Student Health Center, respectively, in April 1994. She did not receive notice of these job vacancies by virtue of being on the reemployment list, but rather she found out about them on her own. Of the three, the only one for which she received her first notice of non-selection in the July 5 letter was the position with the Student Health Center. She did not know that the Student Health Center position had been filled prior to receipt of the July 5 letter.

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## DISCUSSION

A complainant must file a notice of appeal with the State Personnel Board within ten calendar days of notice of the action being appealed. Sections 24-50-125(3) and 24-50-125.4(1), C.R.S. (1988 Repl. Vol. 10B); Rules R10-5-1(B) and R10-6-1(A), 4 Code Colo. Reg. 801-1. Otherwise, the appeal must be dismissed for lack of subject matter jurisdiction. State Personnel Board v. Gigax, 659 P.2d 693 (Colo. 1983).

In this appeal of an administrative, as opposed to disciplinary action, Complainant bears the burden to prove by preponderant evidence that Respondent's action was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991). As an initial matter, it must be established that the State Personnel Board has jurisdiction to hear the appeal.

Complainant's testimony was somewhat vague and confusing as to time frames, dates, sequence of events and jobs applied for despite direct questions from the administrative law judge that were asked in the interest of clarification. To the extent that this confusion may cloud the findings of fact and conclusions of law contained in this decision, the questions are resolved against the party bearing the burden of proof, i.e., Complainant. See People v. Taylor, 618 P.2d 1127 (Colo. 1980). See also Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

All issues pertaining to Complainant's removal from the reemployment list were properly dismissed in Case No. 95B005. The only claims and allegations that are now timely are those of which Complainant received notice in the July 5, 1994 letter from

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Director Liley. It appears from the evidence that the only new information contained in the letter involved Complainant's application for a position with the Student Health Center. Complainant seems to be alleging that, through the proper administration of reemployment procedures, she would have been hired into that position. If Complainant is thus alleging a denial of her reemployment rights with respect to the Student Health Center position, then she is entitled to a hearing on that issue alone. All other matters and events stemming from the original abolishment of Complainant's position are beyond the scope of the Board's subject matter jurisdiction at this point in time.

Although her non-selection to fill the Student Health Center position was apparently one of the matters Complainant intended to address in this appeal, the generality of the issues, as stated in the notice of appeal and in Complainant's prehearing statement (filed on January 26, 1995), is inadequate to provide fair and reasonable notice to Respondent of the specific action being appealed. The fairest (to both parties) and cleanest way to resolve this matter is to dismiss the present appeal on grounds of untimeliness, as was the earlier appeal involving the same issues, while reserving Complainant's right to challenge the alleged denial of reemployment rights with the required specificity delineated herein.

#### **CONCLUSIONS OF LAW**

1. Complainant's appeal is untimely except as to the alleged denial of reemployment rights with respect to her application for the Student Health Center position.
2. The State Personnel Board is without subject matter

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jurisdiction to hear Complainant's appeal except for her allegation that she was denied reemployment rights when she was not selected to fill the Student Health Center position.

**ORDER**

Complainant's appeal is dismissed with prejudice in all respects except as to her appeal of her non-selection to fill the Student Health Center position, which is dismissed without prejudice. Complainant may file a new appeal vis-a-vis the Student Health Center position within ten calendar days of the date of the mailing of this initial decision.

DATED this \_\_\_\_ day of  
April, 1995, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of April, 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol A. Davey  
529 32 1/2 Road  
Clifton, CO 81520

and in the interagency mail, addressed as follows:

William E. Thro  
Assistant Attorney General  
Department of Law

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Human Resources Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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**NOTICE OF APPEAL RIGHTS**

**EACH PARTY HAS THE FOLLOWING RIGHTS**

1. *To abide by the decision of the Administrative Law Judge ("ALJ").*
2. *To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).*

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### **RECORD ON APPEAL**

*The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$259.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.*

### **BRIEFS ON APPEAL**

*The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.*

### **ORAL ARGUMENT ON APPEAL**

*A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.*

### **PETITION FOR RECONSIDERATION**

*A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.*

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